

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

WASHINGTON OFFICE  
3000 K STREET, NW, SUITE 300  
WASHINGTON, DC 20007-5116  
TELEPHONE (202) 424-7500  
FACSIMILE (202) 424-7647

NEW YORK OFFICE  
919 THIRD AVENUE  
NEW YORK, NY 10022-9998  
TELEPHONE (212) 758-9500  
FACSIMILE (212) 758-9526

December 16, 1998

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Room 222  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Ex Parte  
Reciprocal Compensation for Dial-up Calls to ISPs  
CC Docket No. 98-96; CPD No. 97-30

Dear Ms. Salas:

On behalf of KMC Telecom, Inc., this letter offers further views concerning resolution of issues concerning reciprocal compensation for dial-up calls to Internet Service Providers (ISPs) in the above-captioned proceedings and specifically responds to recent *ex parte* submissions by Bell Atlantic,<sup>1</sup> SBC,<sup>2</sup> and Ameritech<sup>3</sup> that contend that states have no authority under Section 251(b)(5) to apply reciprocal compensation obligations to dial-up calls to Internet Service Providers ("ISPs") because this traffic is jurisdictionally interstate.

In *Iowa Utilities Board*, the 8th Circuit considered and rejected the Commission's argument that the Commission possessed pricing authority under Section 251 of the Act because Section 251 services and elements - including reciprocal compensation - could be used in connection with interstate communications.<sup>4</sup> The Court found that the regulatory provisions in Section 251 of the Act concerned fundamentally intrastate matters subject to state authority even

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<sup>1</sup> Letter to Suzanne Tetreault, Office of General Counsel from Michael Glover, Bell Atlantic, November 23, 1998.

<sup>2</sup> Letter to Magalie Roman Salas from James D. Ellis, SBC Communications, Inc.

<sup>3</sup> Letter to Magalie Roman Salas, Secretary, from Gary L Phillips, Ameritech, November 23, 1998.

<sup>4</sup> *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *cert. granted sub nom.* *AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998). ("*Iowa Utilities Board*")

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though the local network is used to originate or complete interstate calls.<sup>5</sup> Thus, the Court rejected the argument that the Commission possessed pricing authority over Section 251 matters because "the plant involved in this case is used interchangeably to provide both interstate and intrastate service..."<sup>6</sup> The Court specifically found that rates for the transport and termination of telecommunications traffic qualify as "charges ... for or in connection with intrastate communications service"<sup>7</sup> and therefore are reserved to the states under Section 251(b)(5). The Court held that:

"subsections 252(c)(2) and 252(d)(2) clearly assign jurisdiction over the rates for the local competition provisions of the Act to the state commissions, thus avoiding the need to analyze the interstate/intrastate character of these services."<sup>8</sup>

Thus, the Court determined that the Commission does not have pricing authority over any of the matters involved in Section 251, including transport and termination of telecommunications, notwithstanding that jurisdictionally interstate traffic may be involved. In light of these determinations of the 8th Circuit, the jurisdictional nature of dial-up calls to ISPs is irrelevant to whether the Commission has authority to govern pricing of any traffic exchanged between local exchange carriers ("LECs"). Indeed, under the 8th Circuit decision, KMC submits that the Commission has no authority to establish, or propose to establish, regulations governing pricing of any such traffic, whether jurisdictionally interstate or intrastate in nature.

KMC also submits that the best interpretation of *Iowa Utilities Board* is that it implicitly vacated the Commission's determination in the *Local Competition Order* that reciprocal compensation under Section 251(b)(5) applies only to local traffic. Given that the 8th Circuit viewed state pricing authority as encompassing reciprocal compensation for all traffic, regardless of its jurisdictional character, *Iowa Utilities Board* must be viewed as contemplating that, in fact, interstate traffic is subject to state authority under Section 251(b)(5).

This view accords with the real world practices of ILECs and CLECs. KMC points out that agreements between ILECs and CLECs subject to state authority, entered into under Section 251, cover all traffic that can be exchanged between CLECs and incumbents, whether interstate or intrastate in nature. A determination by the Commission that compensation between LECs for interstate traffic is not subject under Section 251(b)(5) to state authority would constitute a major disruption to all interconnection agreements. Rather, the Commission should conclude

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<sup>5</sup> 120 F.3d at 799.

<sup>6</sup> *Id.*

<sup>7</sup> 47 U.S.C. Sec 152(b).

<sup>8</sup> 120 F.3d at 798.

that under *Iowa Utilities Board* compensation between LECs, including compensation for jurisdictionally interstate traffic, is subject to state authority.

The arguments of Bell Atlantic that states do not have authority under Section 251(b)(5) for interstate traffic because the 8th Circuit only vacated the rules and not the text of the order is unpersuasive. The Court vacated all of the Commission's pricing rules (except as applied to CMRS) because it determined that the Commission did not have any pricing authority under the local competition provisions of the 1996 Act. The fact that the Court specifically excluded from vacation the application of the rules to CMRS shows that where it wanted to preserve the Commission's authority it knew how to do so. If it had intended to preserve Commission pricing authority for reciprocal compensation for interstate traffic it would have said so. Thus, the Court's wholesale vacation of the Commission's rules is fully consistent with, and supports, the view that under *Iowa Utilities Board* the Commission has no pricing authority concerning reciprocal compensation for exchange of traffic between incumbent and competitive LECs at all, even for jurisdictionally interstate traffic. Further, since states have pricing authority under Section 251(b)(5), it logically must be the case that jurisdictionally interstate traffic can be subject to state authority under Section 251(b)(5).

Ameritech's argument that the Commission already has a policy for intercarrier compensation for interstate traffic is little more than an invention. In fact, there is no such federal policy for intercarrier compensation for exchange of traffic between LECs. As noted, the industry practice is that interconnection agreements negotiated under Section 251, and subject to state arbitration, encompass both interstate and intrastate traffic.

KMC also stresses the importance of the Commission making clear that, notwithstanding any determination that dial-up calls to ISPs can be jurisdictionally interstate, ISPs do not purchase, and are not receiving, interstate access services from local exchange carriers. Instead, in view of the "ESP exemption," they purchase local telephone exchange service to permit customers to reach them. This clarification is necessary in order to assure that existing state decisions are preserved. KMC further submits that the Commission must determine that states correctly determined that dial-up calls to ISPs should be treated as local for purposes of reciprocal compensation. The Commission should determine that in view of the "ESP exemption" from interstate access charges, the fact that ISPs purchase local telephone exchange service to permit customers to reach them, and the treatment of such calls as local for jurisdictional separations purposes, shows that states have correctly determined that this traffic is local for reciprocal compensation purposes notwithstanding that the Commission has determined that it can be jurisdictionally interstate.

KMC further believes that state authority over compensation between LECs does not seriously undercut the Commission's authority over interstate communications. The Commission would continue to enjoy authority over matters that the Court found outside the scope of the local competition provisions of the 1996 Act, such as interstate access charges.

Finally, KMC takes this opportunity to reiterate that the Commission's previous determinations and long-standing policy concerning regulatory treatment of telecommunications versus information services compel the Commission to determine that dial-up calls to ISPs are subject to reciprocal compensation under Section 251(b)(5).<sup>9</sup> Thus, under the Commission's own long-standing "contamination doctrine" information services are considered exclusively an information service for regulatory purposes notwithstanding that they are comprised in part of, and use, telecommunications.<sup>10</sup> The Commission recently renewed this doctrine when it determined in the *Report to Congress* that the telecommunications components of an information service would not be given any separate "legal status."<sup>11</sup> Rather, for regulatory purposes an information service is exclusively an information service. Moreover, the Commission has determined that for regulatory purposes information services and telecommunications services are "mutually exclusive" as a matter of statutory construction.<sup>12</sup> Accordingly, the Commission is required to determine that for purposes of reciprocal compensation the telecommunications portion of a dial-up call to an ISP terminates when it reaches the ISP. If the Commission were to determine that the telecommunications portion of the call extends for reciprocal compensation purposes past the ISP, it would be violating its own determination that information services and

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<sup>9</sup> See Letter from KMC Telecom, Inc. to William Kennard, November 6, 1998.

<sup>10</sup> As stated by the Commission: "[u]nder the 'contamination theory' developed in the course of the *Computer II* regulatory regime, [value added networks] that offer enhanced protocol processing services in conjunction with basic transmission services are treated as unregulated enhanced service providers. The enhanced component of their offerings 'contaminates' the basic component, and the entire offering is therefore considered to be enhanced." *Computer III Phase II Recon. Order*, 3 FCC Rcd at 1153, n. 23.

<sup>11</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67, released April 10, 1998, para. 79 ("Report to Congress").

<sup>12</sup> *Id.* para. 39.

telecommunications are mutually exclusive regulatory categories under the Act. Therefore, dial-up calls to ISPs are subject to reciprocal compensation because CLECs are engaged in the transport and termination (at the ISP) of telecommunications.

Respectfully submitted,



Richard Rindler  
Patrick Donovan  
Counsel for KMC Telecom, Inc.

cc: Chairman  
Commissioners  
Kathryn Brown  
Legal Assistants  
Christopher Wright  
Suzanne Tetreault  
Larry Strickling  
Jim Schlichting  
Richard Cameron  
Jane Jackson  
Richard Lerner  
Tamara Preiss  
Edward Krachmer